* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on February 27, 2007
% Date of decision: March 30, 2007

\+ FAO No 445/2003 & CM No 10890/2006

\# SURAM PAL SINGH ..... APPELLANT
! Through: Mr. Rakesh Kumar, Advocate

Versus

$ SAVITA .... RESPONDENT
^ Through: Mr. Mukul Sharma, Advocate

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1, Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

Dr. S.Muralidhar, J.

1. This appeal is directed against the judgment and decree dated 6.5.2003 passed by the learned Additional District Judge, Delhi dismissing the HMA No 447 of 2000 filed by the appellant herein seeking divorce on the ground of cruelty and desertion.

Background facts:

2. The appellant and the respondent were married in Delhi on 26.2.1984. A female child was born to them on 14.11.1985. The case of the appellant is that right from the beginning, the respondent showed no interest in doing the household work; was

not interested to live in the village where matrimonial home was located and started showing disrespect to him in the presence of his relatives. She had insisted for the delivery of the first child in Delhi to which the petitioner reluctantly agreed just to please the respondent. Even after return to the matrimonial home, the behaviour of the respondent did not been change and she insisted on their returning to Delhi. It is stated that on 25.4.1984 when some relatives of the appellant visited their matrimonial home, she started insulting the appellant; made wild accusations against him and lowered his position in the eyes of his relatives. Again on 28.8.1984 she abused and shouted at the appellant, created a scene in the presence of the neighbours. On 11.9.1984 the respondent threatened to set herself on fire by pouring kerosene oil and implicate the appellant and his family members if he forced her to do any work in the matrimonial home.

3. The appellant states that he made numerous efforts from December 1985 to January 1986 for reconciliation through the senior members of his family but the respondent did not change her behaviour. She refused to have sexual intercourse on 16.7.1985 and 12.8.1985 and threatened to injure him. On 12.2.1986 the respondent threatened that in future if he tried to have intercourse with her, she would hang herself. Seven days

thereafter she again refused to have sexual intercourse and declared that she is not prepared to accept the appellant as her husband. On 14.11.1986 when the appellant wanted to celebrate the birthday of the first child, the respondent started abusing and shouting and stated that she would kill herself and the baby. Meanwhile, she again became pregnant and again insisted that the delivery of the second child should be at Delhi. At that time she took away the entire jewellery and cash. The second female child was born on 18.1.1987. Thereafter the appellant visited the respondent thrice and every time she insulted him in the presence of her relatives. The respondent refused to come back in the matrimonial home thereafter.

Pleadings :

5. The appellant filed a petition under Section 9 of the Hindu Marriage Act, 1955 ('Act') in the Civil Court at Bulandshahar, Uttar Pradesh for restitution of conjugal rights. Meanwhile, during the pendency of this petition, on 6.2.1990 the appellant filed a petition being HMA No 477 of 2000 (Old No 103/1990) against the respondent under Section 13(1)(ia) and (ib) of the Act. When the appellant originally filed the matrimonial petition, he made a number of allegations about his having come to know of the illicit relationships of the respondent with some other persons.

He named those persons, gave a lengthy narration of the respondent's illicit relationship with them and even alleged to have found them in a compromising position. However, in a subsequent amended application, he appears to have dropped all these allegations. It was this that had prompted the respondent to file an application under Order VI Rule 16 CPC pointing out that reference to the alleged adulterous associations of the respondent are not only false and incorrect, they are also scandalous, defamatory and vexatious to a fair trial. The respondent pointed out in her application that these allegations were inconsistent with the pleadings in the application for restitution of conjugal rights and in any event inconsistent with the letters written by the appellant to the respondent. Further the very conduct of the appellant in continuing to live with the respondent and the begetting children showed that the adultery, if any, was condoned by the appellant.

6. It appears that on 19.8.1991 the appellant had filed an application for amending the petition to include the ground of desertion in the main petition. However, no order appears to have been passed on the said application. An amended petition appears to have filed by the appellant on 18.4.1992 but no formal application was filed for amending the petition although the

respondent filed a reply to the amended application. By an order dated 8.12.1998 this application was dismissed after observing that the respondent had moved an application under Order VI Rule 16 CPC for striking out certain pleadings and hence the present amendment application could not be entertained.

7. In the written statement filed by the respondent while denying the allegations made by the appellant, it was pointed out that the appellant and the respondent had shifted to the flat belonging to the father of the respondent at B-50/II-344, Lancer's Road, Delhi so that it would be convenient for the appellant to attend his office at Shalimar Bagh, Delhi. In reply to para 14 of the amended petition, the respondent denied the allegation that on 11.9.1984 she had threatened to kill herself if she was compelled to do work in the matrimonial home. In reply to para 18 of the petition where it was alleged that the respondent had refused to have sexual intercourse on 16.7.1985 and 12.8.1985 and the respondent pointed out that she was pregnant for about seven months at that time and it was not advisable for her to have sexual intercourse with the appellant lest she suffered miscarriage or some other complication. Likewise in reply to para 23, it was pointed out that during those days on which the appellant alleged that the respondent had refused to have sexual intercourse that

she was 3-5 months pregnant. The respondent maintained that sexual intercourse between the parties was normal, otherwise two children would not have been born.

8. The written statement of the respondent further pointed out that Criminal case under Section 498-A and 406 read with 34 IPC has been instituted against the appellant. It was pointed out that although the petitioner had stated in para 28 that he had withdrawn the petition filed in the Civil Court of the Bulandshahar for restitution of conjugal rights, those proceedings had in fact been stayed by the Hon'ble Supreme Court. The respondent contended that the it was the appellant who had treated her with cruelty and had turned her out from the matrimonial home along with her infant children since she declined to fulfill the dowry demand of the appellant.

9. In rejoinder, it was pointed out by the appellant that he had decided to withdraw the application for restitution of conjugal rights at the time of filing the petition for divorce; that the respondent had deserted the matrimonial home on her own accord and that there was no scope for the parties to live together as husband and wife.

10. Interestingly, on 9.4.2001 the respondent also moved an application for amendment of the written statement to incorporate the fact that she had come to know from reliable sources that the appellant had been living in adultery with a person through whom he also had a male child in April 2000. No final order appears to have passed on this application as well.

Deposition of the witnesses

11. On behalf of the appellant, he examined himself as PW-1 and on behalf of the respondent she examined herself as RW-1 and her father as RW-2.

12. In examination-in chief, the appellant adverted to the cruel behaviour of the respondent on 26.6.1984, 11.9.1984, 15.1.1985, 12.2.1986 and 14.11.1986. He stated that since January 1987, the respondent had been living away from him. In his cross-examination, he admitted that he had been working as TGT in the Government High School No.2, Mansarovar Park, New Delhi since 12.4.1985. He admitted that after the grant of stay of the petition under Section 9 for restitution of conjugal rights, he made no efforts to bring the respondent back to the matrimonial home. He denied that he refused to return the dowry articles. He further

accepted that the flat at Lancer's Road was allotted to the respondent's father but he denied that he had ever lived in that flat. He stated that "I do not know as to in which hospital the second child and first child were born." He further stated "I do not remember if the respondent was pregnant when she refused to have sexual intercourse with me." Confronted with the affidavit dated 3.12.1993 filed by the appellant which indicated that the appellant was living at Delhi, he admitted "it is correct that I have mentioned in para 3 in said reply that I am also maintaining a home for myself at Delhi. Sometimes I stay at my friend's residence at A-35, West Nathu Colony, Shahdara, Delhi." He further admitted in his cross-examination "it is correct that in my petition dated 25.1.1990 I have levelled allegations against the respondent regarding her character but in my amended petition those allegations stand deleted. It is incorrect to suggest that I have done so because the same were incorrect and I had no moral courage to prove it. Vol : in fact I had no sufficient evidence for the same. I did not level these allegation in my petition under Section 9 H.M.A. at Bulandshahar and also in my petition under Section 10 Guardianship and Wards Act."

13. In her deposition, the respondent maintained that three months prior to the birth of elder daughter i.e. on 14.11.1985 at

Delhi, she and the appellant came to reside at Quarter No. 344, Lancer's Road, Timar Pur, Delhi which flat had been allotted to her father. She categorically stated that “I and my husband shifted to Quarter at Timarpur along with entire articles of household. We had come to live at Delhi even after delivery.” She maintained that she was turned out of the house by the appellant and that “If my husband takes his house in Delhi, I am prepared to live with him.” She remained firm in her cross-examination when she reiterated the cruelty meted out by the appellant. She stated that after the birth of second child she returned to Timarpur flat. Ten days later when she visited the appellant’s village, her parent’s-in-law were not happy to see her as they said that another girl had been born. She further stated that her parents-in- law used to visit their house at Timarpur every month or so but did not stay permanently. In her cross-examination she stood by her statement in the written statement that the appellant was having questionable relations with a married lady who used to interfere in the domestic affairs between the appellant and the respondent. She stated that since January 1987 she was living with her parents. She denied that the main cause for her leaving matrimonial home was that she never wanted to live in the village.

14. The father of the respondent was examined as RW-2 and he stated that no efforts were made for reconciliation by the appellant and his family members. Although the father of the respondent made some efforts, they had failed.

Judgment of the Trial Court :

15. The Trial Court examined the entire evidence and concluded that by filing a petition under Section 9 of the Act for restitution of conjugal rights prior to the filing of the petition for divorce, the appellant had condoned the acts of cruelty and that there was no narrated instance of cruelty after filing the said petition. The Trial Court further held that even otherwise the allegations made do not constitute cruelty. The Trial Court further found that even after being given a flat at Delhi where the appellant was working as a TGT, his insistence that they should stay at Naya Bans, a village of Bullandshahar, UP while he would work at Delhi appears to constitute an unreasonable behaviour towards the respondent. It was held that this demand of the respondent could be said to be a cruel act. As regards the allegations of desertion, the Trial Court observed that the only allegation made by the appellant was that the respondent was living of her own accord at her parent's home at Delhi along with two female children after the delivery of the second child. The appellant failed to prove the essential

ingredients of desertion. Accordingly, the Trial Court dismissed the petition filed by the appellant.

Submissions of counsel

16. Learned counsel for the appellant first assailed the impugned judgment of the Trial Court on the ground that the evidence on record indicated that the respondent had deserted the appellant after the birth of the second child. Learned counsel referred to the letters written by the appellant on 3.12.1987, 19.12.1987 and 11.1.1988 calling upon the respondent to join the matrimonial home despite which the respondent did not oblige. As regards the criminal complaint made on 5.10.1987, learned counsel for the appellant contended that a plain reading of the said complaint would show that it was false since there was no occasion for the appellant to drive out the respondent from the matrimonial home as alleged by her. He referred to the respondent's testimony in the application under Section 125 Cr.PC before the Chief Metropolitan Magistrate where she had stated that she was residing with her father since January 1987 after the birth of her younger daughter. He also referred to the suggestion put to the respondent during her cross-examination that she never want to live in the village. Reliance was placed on the decision in ***Rajkishore Prasad v. Raj Kumar Devi*** AIR 1986 Patna 362, ***Kalpana Srivastava v. Surendra Nath Srivastava*** AIR 1985 Allahabad 253, ***Durga***

Prasanna Tripathy v. Arundhati Tripathy II (2005) DMC 453 (SC), ***Shyamsunder Amarlal Hotchandani v. Smt. Arti alias Sunita Shyamsunder Hotchandani*** AIR 2004 Bombay 311 and ***Narinder Kumar v. Suresh Kumari*** AIR 1988 Delhi 222 to contend that the filing of a false criminal complaint against the husband can lead to the inference that the respondent wanted to live separately from the appellant on a permanent basis and this was sufficient to prove her intention to desert the matrimonial home.

Desertion not proved

17. As regards this contention, it may be recalled that the appellant in his cross-examination admitted that the father of the respondent did have a flat at Timparpur although he denied living there. Nevertheless, it is clear from his cross-examination that the appellant had been employed in Delhi since 1985. He also admitted to stay in Delhi at various points of time even after the filing of the petition. On the other hand, the statement made by the respondent in the Section 125 Cr.PC proceedings before the learned Magistrate are also consistent with her basic contention that the parties were lived together in the flat at Timarpur.

18. It appears that the entire case of desertion is now being argued for the first time in these proceedings whereas the focus of the appellant in the Trial Court was on the ground of cruelty. Be that as it may, the truth of the criminal complaint filed by the respondent, which indicates that the appellant drove out the respondent from the matrimonial home, cannot possibly be adjudicated in these proceedings. On the contrary, the evidence in these proceedings indicates the respondent has been willing to resume matrimonial life as long as the parties returned to the flat at Timarpur where they stayed. Given the fact that they were staying in that flat after the second child was born, it cannot be said that by refusing to go back to the village thereafter, the respondent had deserted the matrimonial home. The essential ingredients of desertion are absent in the present case. This Court is unable to accept the contention that the criminal complaint is false and that by itself is indication of the respondent to desert the matrimonial home. It is not possible to overlook the evidence actually recorded in the instant case in order to determine if a case of desertion is made out by the appellant. In the considered view of this Court, the appellant has not.

19. Learned counsel for the appellant relied upon the judgments in ***P.Kalyanasundaram v. K. Paquialatechamy*** AIR 2004

Madras 43 and ***Gajendra v. Smt. Madhu*** AIR 2001 MP 299 to contend that the respondent did not make any efforts to join the matrimonial home and therefore the divorce on the ground of desertion ought to be granted. As already noticed, the facts of the instant case indicate that the appellant did not pursue the petition for restitution of conjugal rights and he too did not make an efforts for reconciliation of the matrimonial life with the respondent. This argument conveniently overlooks the cruel treatment to which the respondent was subject and which the appellant has been unable to dislodge during her cross-examination.

20. The learned counsel for the respondent pointed out that the appellant was in the habit of making all kinds of allegations against the respondent and about her so-called illicit relationships. Although he made such allegations in the first version of the petition, later on he gave it up by filing an amended petition. Learned counsel for the respondent rightly contends that all the allegations of cruelty essentially turned around the refusal of the respondent to have sexual intercourse with the appellant on the dates when obviously she was pregnant with the second child. As rightly held by the Trial Court, the fact that two children were born to the parties showed that the appellant was insisting on having sexual intercourse even when the respondent was in an advanced

state of pregnancy. In fact his conduct showed that the appellant was treating the respondent with cruelty and not the other way round.

21. Having failed in his petition to prove cruelty in the Trial Court, the entire attempt before this Court is to seek divorce on the ground of desertion. On a perusal of the evidence on record, this Court is unable to come to a conclusion that the respondent is guilty of desertion. Also, the conclusion of the Trial Court that no case of cruelty is made out by the appellant is correct and does not call for any interference whatsoever.

22. Finally it was urged that the since the parties have been living separately since January 1987, that by itself constituted an irretrievable break-down of marriage. Since there was no scope of the marriage surviving, the appellant should be granted divorce by this Court on the strength of the judgment of the Hon'ble Supreme Court in ***Naveen Kohli v. Neelu Kohli*** JT 2006 (3) SC 491.

23. This submission cannot be accepted in the facts and circumstances of the case where far from proving, even on a preponderance of probabilities, that the respondent had treated him cruelly, it appears that the appellant was the one who

compelled the respondent to stay away from the matrimonial home, making no effort to take back the respondent. The appellant cannot be permitted to take advantage of a situation brought about by the appellant himself and seek divorce on the ground of irretrievable break-down. As already held in ***Shyam Sunder Kohli v. Sushma Kohli*** 2004 (2) HLR 513 by the Hon'ble Supreme Court, divorce on the ground of irretrievable break-down of marriage is not lightly to be granted to the parties unmindful of the facts of the case. This Court is, therefore, not inclined to accept this plea.

24. For all of the above reasons, there is no merit in this appeal and it is dismissed with costs of Rs.5,000/- which will be paid by the appellant to the respondent within a period of four weeks from today. The pending application also stands dismissed.

Sd/-

March 30, 2007 **S. MURALIDHAR, J.**

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